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CITATIONS

741808—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1246

WALL WIRE PRODUCTS COMPANY, PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The district court wrote no opinion. Its findings of fact and conclusions of law appear at pages 29 to 31 of the record. The opinion of the circuit court of appeals (R. 38) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on March 17, 1947 (R. 37). The petition for a writ of certiorari was filed on April

14, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether a share of the profits, which was paid each month to employees pursuant to a collective bargaining agreement and allocated to employees on the basis of the number of straight time hours worked, constitutes a part of the regular rate of compensation within the meaning of Section 7 (a) of the Fair Labor Standards Act.

STATUTE INVOLVED

Section 7 (a) of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, 29 U. S. C. 201, *et seq.*) provides that

> No employer shall * * * employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> * * * * *
>
> (3) for a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

This action was instituted by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 17 of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat.

1060, 29 U. S. C. 201, *et seq.*) to enjoin petitioner from violating the overtime provisions of the Act. The Administrator moved for summary judgment and petitioner made a cross-motion for the same relief (R. 7, 27). The district court denied the Administrator's motion and entered summary judgment for petitioner (R. 32). The circuit court of appeals reversed the decision of the district court and remanded the cause for the issuance of an injunction (R. 37).

Petitioner employs over one hundred employees who admittedly produce goods for interstate commerce (R. 5, 29). Under a collective bargaining agreement, in addition to "minimum" hourly rates of pay specified in the contract, 25 percent of the company's profits before income taxes are distributed monthly [1] to virtually all its employees "on the basis of the actual number of hours worked straight time" (R. 12, 29). Overtime hours are not considered in making the allocation (R. 13, 30). Overtime compensation is based on the specified hourly rates of pay, exclusive of the profit sharing payments (R. 10, 24, 30).

The district court concluded that the payments made to employees pursuant to the profit-sharing provisions of the contract were not compensation within the meaning of Section 7 and "were not part of their 'regular rate of compensation' upon

[1] Year-end adjustments are made if annual profits exceed the sum of the monthly profit figures but not if they are less (R. 12, 13).

which overtime payments must be made" (R. 31). The circuit court of appeals reversed, holding that the regular rate is "the total compensation agreed upon and received by the employees, not including overtime" and that "the total compensation agreed upon was the hourly rate of pay specified in the collective bargaining contract, plus the share of profits which it was agreed all employees would receive by way of additional compensation" (R. 41).

ARGUMENT

The decision of the circuit court of appeals correctly and literally applies the principle enunciated by this Court that the regular rate "must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments" (*Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 424), and that, in determining the regular rate, we must look "to the actual payments, exclusive of those paid for overtime, which the parties have agreed shall be paid during each workweek" (*Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, 430). In the instant case, the collective bargaining agreement provided for the monthly distribution of a share of the profits in the article of the contract dealing with wages (R. 12, 29) and specifically allocated the profit-sharing payments to non-overtime hours (R. 13, 30). Under these circumstances, the decisions of this Court fore-

close any result other than that reached by the court below. No conflict with the decisions of the circuit courts of appeals is asserted[2] and the decision is in accord with the interpretation of the Administrator.[3]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

WILLIAM S. TYSON,
Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

MORTON LIFTIN,
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United States Department of Labor.

MAY 1947.

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[2] The circuit courts of appeals have all reached the same result in related but varying bonus situations. *Carleton Screw Products Co.* v. *Fleming*, 126 F. 2d 537 (C. C. A. 8) (lump sum addition to base pay); *Walling* v. *Stone*, 131 F. 2d 461 (C. C. A. 7) (piece work incentive bonus); *Walling* v. *Richmond Screw Anchor Co.*, 154 F. 2d 780 (C. C. A. 2) (predetermined percentage of base pay); *Walling* v. *Garlock Packing Co.*, 159 F. 2d 44 (C. C. A. 2) (participation in dividends), certiorari denied, May 5, 1947, No. 1191, this Term.

[3] The Administrator's interpretation is reprinted in the Appendix to this brief, *infra*, pp. 6–10.

APPENDIX

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For Release Monday,
February 5, 1945

U. S. DEPARTMENT OF LABOR
Wage and Hour and Public Contracts Divisions
165 West 46th Street
New York, New York

BONUS PAYMENTS

A summarization of the position of the Wage and Hour and Public Contracts Divisions with regard to the inclusion of "bonus" payments in computation of "regular" or "basic" rates of pay for overtime purposes under the Fair Labor Standards Act and the Walsh-Healey Act was issued today by L. Metcalfe Walling, Administrator of the Wage and Hour and Public Contracts Divisions. This statement was prompted, the Administrator said, by numerous inquiries from employees and employers requesting clarification of the principles followed by the Divisions in applying the overtime requirements of these acts to situations where "bonus" payments are distributed by employers to employees who work overtime.

Mr. Walling's statement follows:

"Under the Fair Labor Standards Act and the Walsh-Healey Act overtime compensation is payable to employees at rates not less than one and one-half times their 'regular' rates as provided in

the Fair Labor Standards Act or 'basic' rates as provided in the Walsh-Healey Public Contracts Act. The 'regular' rate of pay has been defined by the United States Supreme Court in recent decisions as 'the hourly rate actually paid for the normal, nonovertime workweek.' The court has also made it clear that no distinction or discrimination based on the method of employee compensation should be made in applying the provisions of the Fair Labor Standards Act. These decisions support, with respect to both acts, the Divisions' views, as announced in release R–1548 and R–1548 (a), dated September 2, 1941. As stated in these releases, where an employee's 'regular' or 'basic' rate of pay is increased by the payment to him of a 'bonus,' additional overtime compensation must be paid for those workweeks in the bonus period when overtime was worked, unless provision is made for the inclusion of such overtime compensation in the 'bonus' payment itself by calculating it on a percentage-of-total-earnings basis.

"Releases R–1548 and R–1548 (a) define the type of 'bonus' which affects the regular rate of pay and describe how such 'bonuses' are to be included in computing the regular rate and the overtime compensation due under the Fair Labor Standards Act. The same rules are applied under the Walsh-Healey Public Contracts Act. These releases, which express the official position of the Divisions with respect to bonus payments, state:

There are two general categories in which bonus plans fall: A. In bonus plans of the first category, the payment and the amount of the bonus are solely in the discretion of the employer. The

sum, if any, is determined by him. The employee has no contract right, express or implied, to any amount. This type of bonus is illustrated by the employer who pays his employees a share of the profits of his business or a lump sum at Christmas time without having previously promised, agreed or arranged to pay such bonus. In such case, the employer determines that a bonus is to be paid and also sets the amount to be paid.

Bonus payments of this type will not be considered a part of the regular rate at which an employee is employed, and need not be included in computing his regular hourly rate of pay and overtime compensation.

B. In bonus plans of the second category the employer promises, agrees or arranges to pay a bonus. The amount to be paid may be fixed or may be ascertainable by the application of a formula. An example of this type of plan is a production bonus based on the excess over a minimum quota which the individual, the group, or the plant, produces in a period of time. Closely akin is a bonus which is paid for performing work in less than an established standard time and also a bonus which is paid when certain types of merchandise are sold through an employee's efforts. Other kinds of bonuses falling within this group are bonuses distributed in a certain amount or on the basis of a fixed percentage of the profits of the employer or of his gross or net income. There are many variations and refinements of plans within this category. For example, the amount of the payment may vary according to the length of service of the employee,

his production or compensation; the earnings, production or compensation of the group of employees with which he works; the sales or net or gross income of the employer; or it may be contingent upon his continuing in the employ of the employer until the time the payment is to be made.

Bonus payments of this type will be considered a part of the regular rate at which an employee is employed, and must be included in computing his regular hourly rate of pay and overtime compensation.

"Many employers have been troubled by retroactive allocation of a 'bonus' where it was distributed less frequently than at the regular pay periods. This difficulty can easily be avoided. No additional overtime compensation need be computed and paid on a bonus, the amount of which is in fact arrived at by taking a predetermined percentage of the total earning of the individual employees (both straight time and overtime), exclusive of the 'bonus'. Where the amount paid to each employee is actually based on a percentage of his total earnings, the 'bonus' itself includes the payment of both straight time and overtime.

"The degree of frequency with which a bonus is paid is a factor which the Divisions have always considered in determining whether it should be included in the 'regular' or 'basic' rates of pay for overtime purposes. As an enforcement policy to be followed in the absence of authoritative rulings by the courts, the Divisions will in the future not insist on the inclusion of

any bonus (except where there is obvious evasion of the overtime requirements) which is paid at greater intervals than quarterly in computations of the 'regular' or 'basic' rate of pay for overtime purposes, even though the bonus would otherwise be of a type requiring such inclusion. Such considerations as the recognized bookkeeping difficulty confronting employers in allocating a bonus paid less often than once each quarter to the hours in which the bonus was earned, the time-consuming burden placed upon the inspection staff when confronted with the task of making such allocations and the benefit to employees of having a current knowledge of the hourly rate upon which their overtime will be calculated motivate this administrative policy.

"This enforcement policy, of course, does not and cannot affect the independent right of employees under section 16 (b) of the Fair Labor Standards Act to bring their own suits to recover wages that are due them."

U. S. GOVERNMENT PRINTING OFFICE: 1947